

INDEPENDENT COUNSEL  
STATUTE

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United States Court of Appeals  
For the District of Columbia Circuit

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED JUL 01 1994

RON GARVIN  
CLERK

Division for the Purpose of  
Appointing Independent Counsels

Ethics in Government Act of 1978, as Amended

In re: Madison Guaranty Savings  
& Loan Association

Order Authorizing  
Attorney General to  
Disclose Application for  
Appointment of  
Independent Counsel

Before: Sentelle, Presiding, Butzner and Sneed, Senior Circuit  
Judges

ORDER

Upon consideration of the request of the Attorney General pursuant to 28 U.S.C. § 592(e) for authorization to disclose the Application for the appointment of an independent counsel in this matter, which concerns allegations that have been widely reported by the news media, it is hereby

ORDERED, in the public interest that leave is granted to the Attorney General pursuant to 28 U.S.C. § 592(e) to publicly disclose the Application.

Per Curiam  
For the Court:

  
Ron Garvin  
Clerk

United States Court of Appeals  
For the District of Columbia Circuit

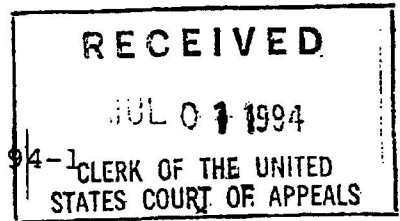
FILED JUL 01 1994

RON GARVIN  
CLERK

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT  
INDEPENDENT COUNSEL DIVISION

APPLICATION TO THE COURT PURSUANT  
TO 28 U.S.C. § 592(c)(1) FOR THE  
APPOINTMENT OF AN INDEPENDENT COUNSEL  
IN RE MADISON GUARANTY SAVINGS &  
LOAN ASSOCIATION

No. PN 94-1



In accordance with the Independent Counsel Reauthorization Act of 1994 (the "Act"), I hereby apply to the Special Division of the Court for the appointment of an Independent Counsel to investigate whether any violations of federal criminal law were committed by James B. McDougal or any other individual or entity relating to Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.

Background. In October 1993, the Resolution Trust Corporation (RTC) referred a number of allegations to the Office of the United States Attorney for the Eastern District of Arkansas arising out of an inquiry into the administration of Madison Guaranty Savings & Loan Association, a defunct Arkansas savings and loan association that was owned by James B. McDougal, who had been a partner with William and Hillary Clinton in Whitewater Development Corporation.

During the same time period, the Office of the United States Attorney for the Eastern District of Arkansas was prosecuting David Hale, an Arkansas municipal court judge who had ties both to the Clintons and to McDougal, for fraud against the Small Business Administration relating to the operation of Hale's investment company, Capital Management Services, Inc. While plea

2

negotiations were underway, Hale made a number of allegations against former associates, including McDougal and the Clintons, concerning the misuse of funds of Capital Management Services.

In November 1993, the Fraud Section of the Criminal Division of the Department of Justice took over the prosecution of Hale and the inquiry into the RTC allegations of misapplication of funds from Madison Guaranty, several of which it determined to be sufficiently specific and credible to provide grounds for preliminary investigation.

On January 20, 1994, I appointed Robert B. Fiske, Jr., as regulatory independent counsel to take over all investigations relating to Madison Guaranty Savings & Loan Association. Mr. Fiske received the following authority:

(a) The Independent Counsel: In re Madison Guaranty Savings & Loan Association shall have jurisdiction and authority to investigate to the maximum extent authorized by part 600 of this chapter whether any individuals or entities have committed a violation of federal criminal or civil law relating in any way to President William Jefferson Clinton's or Mrs. Hillary Rodham Clinton's relationships with (1) Madison Guaranty Savings & Loan Association, (2) Whitewater Development Corporation, or (3) Capital Management Services.

(b) The Independent Counsel: In re Madison Guaranty Savings & Loan Association shall have jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal or civil law by any person or entity developed during the Independent Counsel's investigation referred to above, and connected with or arising out of that investigation.

(c) The Independent Counsel: In re Madison Guaranty Savings & Loan Association shall have jurisdiction and authority to investigate any violation of section 1826 of title 28 of the U.S. Code, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal law, in connection with any investigation of the matters described in part (a) or (b) of this section.

(d) The Independent Counsel: In re Madison Guaranty Savings & Loan Association shall have jurisdiction and authority to seek indictments and to prosecute, or bring civil actions against, any persons or entities involved in any of the matters referred to in part (a), (b), or (c) who are reasonably believed to have committed a violation of any federal criminal or civil law arising out of such matters, including persons or entities who have engaged in an unlawful conspiracy or who have aided or abetted any federal offense.

28 C.F.R. § 603.1.

Independent Counsel Fiske has not reported to the Department of Justice concerning his investigative results or the direction of his investigation.<sup>1</sup> However, he has reviewed this Application and has affirmed that with respect to the matters referred to him, there exists reasonable grounds to believe that further investigation is warranted pursuant to 28 U.S.C. § 592(c)(1)(A).

Basis for Appointment of Statutory Independent Counsel.

On June 30, 1994, the Independent Counsel Act was reauthorized. I have concluded that the circumstances of this matter call for the appointment of an independent counsel pursuant to 28 U.S.C. § 592(c)(1)(A), because investigation by the Department of Justice of the allegations of violations of criminal law by McDougal and other individuals associated with President and Mrs. Clinton in connection with Madison Guaranty Savings & Loan, Whitewater Development Corporation, and Capital Management Services, Inc., would present a political conflict of

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<sup>1</sup> A copy of a public report dated June 30, 1994, concerning the results of his investigation into the death of Vincent W. Foster, Jr. was provided by Mr. Fiske after its public release on June 30, 1994.

4

interest. See Independent Reauthorization Act of 1994, § 4(a) (amending 28 U.S.C. § 591(c)). Accordingly, I hereby request that the Court appoint a statutory independent counsel as soon as possible, and that the Court appoint Robert B. Fiske, Jr. so that he may continue his ongoing investigation without disruption and with the full independence provided by the Act.<sup>2</sup>

Recommended Jurisdiction. Pursuant to 28 U.S.C. § 593(b)(3), I recommend and request that the Special Division of the Court grant the statutory independent counsel the same prosecutorial jurisdiction as that granted to regulatory Independent Counsel Fiske, so that the investigation may continue without interruption. In this connection, I have appended hereto a proposed statement of the scope of prosecutorial jurisdiction for the statutory independent counsel.<sup>3</sup>

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<sup>2</sup> The reauthorizing legislation allows the Court to appoint Mr. Fiske as statutory independent counsel. Independent Counsel Reauthorization Act of 1994, § 7(h). I appointed Mr. Fiske on the basis of his record of independence and his outstanding qualifications, and he has been investigating this matter as an independent prosecutor for five months. His staff, selected by him, is established and is fully engaged in the investigation. Appointment of a different independent counsel would seriously disrupt the investigation.

<sup>3</sup> The intent of the proposed statement of independent counsel's prosecutorial jurisdiction is to give him exactly the same jurisdiction as that given to regulatory Independent Counsel Fiske, except that as regulatory Independent Counsel, Mr. Fiske was also given civil jurisdiction. To ensure that the full scope of Mr. Fiske's independent civil investigation continues uninterrupted and without limitation, it is my intention to continue Mr. Fiske's regulatory appointment for this purpose, or, to name whomever the Court may select as statutory independent counsel as an independent special attorney to handle all civil aspects of the investigation. (U.S. 16326) Dec 14 70105304 Page 7  
FOIA # 97720

5

Request for Authorization for Public Disclosure. I request that the Court authorize the disclosure of this Application to the public pursuant to 28 U.S.C. § 592(e). The allegations underlying this Application, and Mr. Fiske's mandate as regulatory Independent Counsel, are known to the public. I believe that the public interest will be served by the disclosure of the Application. I have submitted a separate motion and proposed order to this effect.

Respectfully submitted,

  
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Janet Reno  
Attorney General of the United States

DATED: June 30, 1994

# STATEMENT OF JURISDICTION OF INDEPENDENT COUNSEL

The Independent Counsel shall have jurisdiction and authority to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether any individuals or entities have committed a violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.

The Independent Counsel shall have jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, by any person or entity developed during the Independent Counsel's investigation referred to above, and connected with or arising out of that investigation.

The Independent Counsel shall have jurisdiction and authority to investigate any violation of 18 U.S.C. § 1826, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal criminal law, in connection with any investigation of the matters described above.

The Independent Counsel shall have jurisdiction and authority to seek indictments and to prosecute any persons or entities involved in any of the matters described above, who are reasonably believed to have committed a violation of any federal criminal law arising out of such matters, including persons or entities who have engaged in an unlawful conspiracy or who have aided or abetted any federal offense.

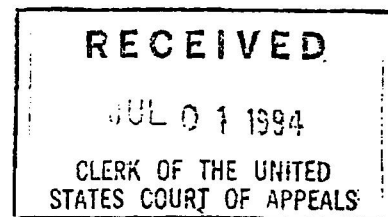
The Independent Counsel shall have all the powers and authority provided by the Independent Counsel Reauthorization Act of 1994.

United States Court of Appeals  
For the District of Columbia Circuit

FILED JUL 01 1994

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT  
INDEPENDENT COUNSEL DIVISION

RON GARVIN  
CLERK




In re MADISON GUARANTY  
SAVINGS & LOAN ASSOCIATION

) No. PN 94-1  
)

NOTIFICATION OF RECUSAL DETERMINATION

Section 591(e)(2) of the Independent Counsel Reauthorization Act of 1994 requires that the Attorney General determine whether she must recuse herself because information received involves "a person with whom the Attorney General has a current or recent personal or financial relationship," and that the determination be filed with this Court. Accordingly, I hereby notify the Special Division of the Court that I have no current or recent personal or financial relationship such as would require my recusal from discharging my responsibilities under the Act.

Respectfully submitted,

  
\_\_\_\_\_  
Janet Reno  
Attorney General of the United States

DATED:

June 30, 1994



United States Court of Appeals  
For the District of Columbia Circuit

FILED JUL 01 1994

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT  
INDEPENDENT COUNSEL DIVISION

RON GARVIN  
CLERK

In re MADISON GUARANTY  
SAVINGS & LOAN ASSOCIATION

) No. PN 94-1  
)

RECEIVED

JUL 01 1994

CLERK OF THE UNITED  
STATES COURT OF APPEALS

MOTION OF THE ATTORNEY GENERAL PURSUANT TO  
28 U.S.C. § 592(e) FOR LEAVE TO DISCLOSE APPLICATION

Pursuant to 28 U.S.C. § 592(e), I hereby seek leave of the Division to disclose to the public the "Application to the Court Pursuant to 28 U.S.C. § 592(c)(1) for the Appointment of an Independent Counsel In Re Madison Guaranty Savings & Loan Association" filed with the Court on this date. The allegations underlying the Application and the commencement of an investigation by the regulatory independent counsel have been widely reported by the news media. If the public were not aware of the Application, the matter could be the subject of misleading speculation while the Application is pending before the Court. In these circumstances, it is in the public interest to permit the public disclosure of copies of the Application submitted to this Court requesting the appointment of an Independent Counsel.

Accordingly, I request the Court's permission to disclose the Application to the public immediately, and have attached a proposed Order to this effect.

Respectfully submitted,

  
\_\_\_\_\_  
Janet Reno

Attorney General of the United States

DATED: June 30, 1994 (URTS 16326) DocId: 70105304 Page 11

**Sec.**

- 594. Authority and duties of an independent counsel.
- 595. Congressional oversight.
- 596. Removal of an independent counsel; termination of office.
- 597. Relationship with Department of Justice.
- 598. Severability.
- 599. Termination of effect of chapter.

**EDITORIAL NOTES**

**Effective Date of Chapter.** Section 604 of Pub.L. 95-621 provided in part that this chapter shall take effect on Oct. 26, 1978.

### § 591. Applicability of provisions of this chapter

(a) **Preliminary investigation with respect to certain covered persons.**—The Attorney General shall conduct a preliminary investigation in accordance with section 592 whenever the Attorney General receives information sufficient to constitute grounds to investigate whether any person described in subsection (b) may have violated any Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction.

(b) **Persons to whom subsection (a) applies.**—The persons referred to in subsection (a) are—

- (1) the President and Vice President;
- (2) any individual serving in a position listed in section 5312 of title 5;
- (3) any individual working in the Executive Office of the President who is compensated at a rate of pay at or above level II of the Executive Schedule under section 5313 of title 5;
- (4) any Assistant Attorney General and any individual working in the Department of Justice who is compensated at a rate of pay at or above level III of the Executive Schedule under section 5314 of title 5;
- (5) the Director of Central Intelligence, the Deputy Director of Central Intelligence, and the Commissioner of Internal Revenue;
- (6) the chairman and treasurer of the principal national campaign committee seeking the election or reelection of the President, and any officer of that committee exercising authority at the national level, during the incumbency of the President; and
- (7) any individual who held an office or position described in paragraph (1), (2), (3), (4), or (5) for 1 year after leaving the office or position.

(c) **Preliminary investigation with respect to other persons.**—

(1) **In general.**—When the Attorney General determines that an investigation or prosecution of a person by the Department of Justice may result in

a personal, financial, or political conflict of interest, the Attorney General may conduct a preliminary investigation of such person in accordance with section 592 if the Attorney General receives information sufficient to constitute grounds to investigate whether that person may have violated Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction.

(2) **Members of Congress.**—When the Attorney General determines that it would be in the public interest, the Attorney General may conduct a preliminary investigation in accordance with section 592 if the Attorney General receives information sufficient to constitute grounds to investigate whether a Member of Congress may have violated any Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction.

(d) **Examination of information to determine need for preliminary investigation.**—

(1) **Factors to be considered.**—In determining under subsection (a) or (c) (or section 592(c)(2)) whether grounds to investigate exist, the Attorney General shall consider only—

- (A) the specificity of the information received; and
- (B) the credibility of the source of the information.

(2) **Time period for making determination.**—The Attorney General shall determine whether grounds to investigate exist not later than 30 days after the information is first received. If within that 30-day period the Attorney General determines that the information is not specific or is not from a credible source, then the Attorney General shall close the matter. If within that 30-day period the Attorney General determines that the information is specific and from a credible source, the Attorney General shall, upon making that determination, commence a preliminary investigation with respect to that information. If the Attorney General is unable to determine, within that 30-day period, whether the information is specific and from a credible source, the Attorney General shall, at the end of that 30-day period, commence a preliminary investigation with respect to that information.

(e) **Recusal of Attorney General.**—

(1) **When recusal is required.**—(A) If information received under this chapter involves the Attorney General, the next most senior official in the Department of Justice who is not also recused shall perform the duties assigned under this chapter to the Attorney General.

(B) If information received under this chapter involves a person with whom the Attorney General has a personal or financial relationship, the Attorney General shall recuse himself or herself by designating the next most senior official in the Department of Justice who is not also recused to perform the duties assigned under this chapter to the Attorney General.

(2) **Requirements for recusal determination.**—Before personally making any other determination under this chapter with respect to information received under this chapter, the Attorney General shall determine under paragraph (1)(B) whether recusal is necessary. The Attorney General shall set forth this determination in writing, identify the facts considered by the Attorney General, and set forth the reasons for the recusal. The Attorney General shall file this determination with any notification or application submitted to the division of the court under this chapter with respect to such information.

(Added Pub.L. 95-521, Title VI, § 601(a), Oct. 26, 1978, 92 Stat. 1867, and amended Pub.L. 97-409, §§ 3, 4(a), Jan. 3, 1983, 96 Stat. 2039, 2040; Pub.L. 98-473, Title II, § 228(b), Oct. 12, 1984, 98 Stat. 2030; Pub.L. 100-191, § 2, Dec. 15, 1987, 101 Stat. 1293; Pub.L. 103-270, §§ 3(j), (k), 4, June 30, 1994, 108 Stat. 735, 736.)

**Proceedings Pending on December 15, 1987.** Section 6(b) of Pub.L. 100-191, set out as a note below, provided that, with respect to previously initiated independent counsel proceedings still pending on Dec. 15, 1987, this section, in its pre-Pub.L. 100-191 form and in lieu of its text as amended by Pub.L. 100-191, shall continue to apply to such pending proceedings until such proceedings are terminated in accordance with this chapter as in effect on the day before the date of enactment of Pub.L. 100-191 [Dec. 15, 1987].

Prior to amendment by Pub.L. 100-191, this section read as follows:

**“§ 591. Applicability of provisions of this chapter**

“(a) The Attorney General shall conduct an investigation pursuant to the provisions of this chapter whenever the Attorney General receives information sufficient to constitute grounds to investigate that any of the persons described in subsection (b) of this section has committed a violation of any Federal criminal law other than a violation constituting a Class B or C misdemeanor or an infraction.

“(b) The persons referred to in subsection (a) of this section are—

“(1) the President and Vice President;

“(2) any individual serving in a position listed in section 5312 of title 5;

“(3) any individual working in the Executive Office of the President who is compensated at or above a rate equivalent to level II of the Executive Schedule under section 5313 of title 5;

“(4) any Assistant Attorney General and any individual working in the Department of Justice compensated at a rate at or above level III of the Executive Schedule under section 5314 of title 5;

“(5) the Director of Central Intelligence, the Deputy Director of Central Intelligence, and the Commissioner of Internal Revenue;

“(6) any individual who held any office or position described in any of paragraphs (1) through (5) of this subsection during the period consisting of the incumbency of the President such individual serves plus one year after such incumbency, but in no event longer than two years after the individual leaves office;

“(7) any individual described in paragraph (6) who continues to hold office for not more than 90 days into the term of the next President during the period such individual serves plus one year after such individual leaves office;

“(8) the chairman and treasurer of the principal national campaign committee seeking the election or reelection of the President, and any officer of the campaign exercising authority at the national level, such as the campaign manager or director, during the incumbency of the President.

“(c) Whenever the Attorney General receives information sufficient to constitute grounds to investigate that any person not described in subsection (b) of this section has committed a violation of any Federal criminal law other than a violation constituting a petty offense, the Attorney General may conduct an investigation and apply for an independent counsel pursuant to the provisions of this chapter if the Attorney General determines that investigation of such person by the Attorney General or other officer of the Department of Justice may result in a personal, financial, or political conflict of interest.”

**EDITORIAL NOTES**

**Effective Date of 1994 Amendment.** Section 7 of Pub.L. 103-270 provided that:

“(a) **In general.**—Except as provided in this section, the amendments made by this Act [amending this section and sections 592 through 596 and 599 of this title and enacting provisions set out as notes under this section and section 113 of Title 3, The President] shall apply with respect to independent counsels appointed before, on, or after the date of enactment of this Act [June 30, 1994].

“(b) **Assignment of employee to certify expenditures.**—An independent counsel appointed prior to the date of enactment of this Act [June 30, 1994] shall assign to an employee the duty of certifying expenditures, as required by section 594(l) of title 28, United States Code, as added by section 3(a) [section 594(l) of this title], by the date that is 30 days after the date of enactment of this Act.

“(c) **Office space.**—The Administrator of General Services, in applying section 594(l)(3) of title 28, United States Code, as added by section 3(a) [section 594(l)(3) of this title], to determine whether the office of an independent counsel appointed prior to the date of enactment of this Act [June 30, 1994] should be moved to a Federal building, shall take into account the moving, legal, and other expenses that might arise if the office were moved.

“(d) **Travel and subsistence expenses.**—For purposes of the restrictions on reimbursement of travel and subsistence expenses of an independent counsel and employees of an office of independent counsel contained in paragraph (3) of section 594(b) of title 28, United States Code, as amended by section 3(b) [section 594(b)(3) of this title], as applied to

the office of an independent counsel appointed before the date of enactment of this Act [June 30, 1994], the 1-year service period shall begin on the date of enactment of this Act.

"(e) **Rates of compensation.**—The limitation on rates of compensation of employees of an office of independent counsel contained in the last sentence of section 594(c) of title 28, United States Code, as amended by section 3(c) [section 594(c) of this title], shall not be applied to cause a reduction in the rate of compensation of an employee appointed before the date of enactment of this Act [June 30, 1994].

"(f) **Periodic reappointment.**—The determinations by the division of the court contained in the last sentence of section 596(b)(2) of title 28, United States Code, as amended by section 3(h) [section 596(b)(2) of this title], shall, for the office of an independent counsel appointed before the date of enactment of this Act [June 30, 1994], be required no later than 1 year after the date of enactment of this Act and at the end of each succeeding 1-year period.

"(g) **Reporting requirements.**—No amendment made by this Act [amending this section and sections 592 through 596 and 599 of this title and enacting provisions set out as notes under this section and section 113 of Title 3] that establishes or modifies a requirement that any person submit a report to any other person with respect to an activity occurring during any time period shall be construed to require that a report submitted prior to the date of enactment of this Act [June 30, 1994], with respect to that time period be supplemented to include information with respect to such activity.

"(h) **Regulatory independent counsel.**—Notwithstanding the restriction in section 593(b)(2) of title 28, United States Code [section 593(b)(2) of this title], the division of the court described in section 49 of that title [section 49 of this title] may appoint as an independent counsel any individual who, on the date of enactment of this Act [June 30, 1994], is serving as a regulatory independent counsel under parts 600 and 603 of title 28, Code of Federal Regulations. If such an individual is so appointed, such an independent counsel shall comply with chapter 40 of title 28, United States Code, as amended by this Act [this chapter], in the same manner and to the same extent as an independent counsel appointed before the date of enactment of this Act is required to comply with that chapter, except that subsection (f) of this section shall not apply to such an independent counsel.

"(i) **White House personnel report.**—Section 6 [enacting provisions set out as a note under section 113 of Title 3] shall take effect on January 1, 1995."

**Effective Date of 1987 Amendment.** Section 6 of Pub.L. 100-191 provided that:

"(a) **In general.**—Subject to subsection (b), the amendments made by this Act [enacting section 599 of this title, amending sections 49, 591, 591 note, and 592 to 598 of this title, sections 203 and 205 of the Ethics in Government Act of 1978 set out in Appendix 4 to Title 5, Government Organization and Employees], and section 202 of Title 18, Crimes and Criminal Procedure, and enacting provisions set out as a note under section 1 of this title] take effect on the date of the enactment of this Act [Dec. 15, 1987].

"(b) **Pending proceedings.**—With respect to any proceeding under chapter 39 of title 28, United States Code [this chapter] (before the redesignation of such chapter as chapter 40 by section 144(g) of Public Law 99-554), or under

chapter 40 of such title [this chapter] (after such redesignation), which is pending on the date of the enactment of this Act [Dec. 15, 1987], the following shall apply:

"(1) Except as provided in paragraphs (2) and (3), the provisions of chapter 40 of such title [this chapter] as in effect on the day before such date of enactment [Dec. 15, 1987] shall, in lieu of the amendments made by this Act, continue to apply on or after such date to such proceeding until such proceeding is terminated in accordance with such chapter.

"(2) The following provisions shall apply to such proceeding on or after such date of enactment:

"(A) Section 593(f) of title 28, United States Code [section 593(f) of this title], as amended by section 2 of this Act, relating to the award of attorneys' fees.

"(B) Section 594(d)(2) of such title [section 594(d)(2) of this title], as added by section 2 of this Act, to the extent that such section 594(d)(2) relates to reports by the Attorney General on expenditures by independent counsel, except that the first such report shall be made only with respect to expenditures on or after the date of the enactment of this Act [Dec. 15, 1987].

"(C) Section 594(h)(1)(A) of such title [section 594(h)(1)(A) of this title], as added by section 2 of this Act, relating to reports by independent counsel, except that the 6-month periods described in such section 594(h)(1)(A) shall be calculated from the date of the enactment of this Act [Dec. 15, 1987].

"(D) Section 594(i) of such title [section 594(i) of this title], as added by section 2 of this Act, relating to the independence of the office of independent counsel for certain purposes.

"(E) Section 594(k) of such title [section 594(k) of this title], as added by section 2 of this Act, relating to custody of records of independent counsel.

"(F) Section 596(a)(3) of such title [section 596(a)(3) of this title], as amended by section 2 of this Act, relating to judicial review of the removal of an independent counsel from office.

"(G) Section 596(c) of such title [section 596(c) of this title], as added by section 2 of this Act, relating to audits of expenditures of independent counsel.

"(H) The amendments made by section 3 of this Act [amending section 202(a) of Title 18, Crimes and Criminal Procedure, and sections 203 and 205 of the Ethics in Government Act of 1978 [Pub.L. 95-521], set out in the Appendix to Title 5, Government Organization and Employees], relating to the status of independent counsel and their appointees as special government employees and to their financial disclosure requirements.

"(3) Section 594(j) of title 28, United States Code [section 594(j) of this title], as added by section 2 of this Act, relating to certain standards of conduct shall, 90 days after the date of the enactment of this Act [Dec. 15, 1987], apply to a pending proceeding described in this subsection."

**Effective Date of 1984 Amendment.** Amendment by Pub.L. 98-473 effective Oct. 12, 1984, see section 235(a)(1)(B)(ii)(IV) of Pub.L. 98-473, set out as an Effective Date note under section 3551 of Title 18, Crimes and Criminal Procedure. Pub.L. 99-646, § 35(2)(D), Nov. 10,



## DEPARTMENT OF JUSTICE

28 § 591

1986, 100 Stat. 3599, amended Pub.L. 99-473, § 235(a)(1)(B)(ii) to delete item (IV).

**Payment of Expenses of Independent Counsel; Semi-annual Financial Review; Report to Congressional Committees.** Pub.L. 100-202, § 101(a) [Title II], Dec. 22, 1987, 101 Stat. 1329-8, provided in part that:

"A permanent indefinite appropriation is established within the Department of Justice to pay all necessary expenses of investigations and prosecutions by independent counsel appointed pursuant to the provisions of 28 U.S.C. 591 et seq. [this chapter] or other law: Provided further, That the Comptroller General shall perform semiannual financial reviews of expenditures from the Independent Counsel permanent indefinite appropriation, and report their findings to the Committees on Appropriations of the House and Senate[.]"

**Applicability to Specific Information Relating to Pending Proceedings.** Section 604 of Pub.L. 94-521 provided in part that the provisions of this chapter shall not apply to specific information received by the Attorney General pursuant to section 591, if the Attorney General determines that—

(1) such specific information is directly related to a prosecution pending at the time such specific information is received by the Attorney General;

(2) such specific information is related to a matter which has been presented to a grand jury and is received by the Attorney General within 180 days of October 26, 1978; or

(3) such specific information is related to an investigation that is pending at the time such specific information is received by the Attorney General, and such specific information is received by the Attorney General within 90 days of October 26, 1978.

### § 592. Preliminary investigation and application for appointment of an independent counsel

#### (a) Conduct of preliminary investigation.—

(1) **In general.**—A preliminary investigation conducted under this chapter shall be of such matters as the Attorney General considers appropriate in order to make a determination, under subsection (b) or (c), on whether further investigation is warranted, with respect to each potential violation, or allegation of a violation, of criminal law. The Attorney General shall make such determination not later than 90 days after the preliminary investigation is commenced, except that, in the case of a preliminary investigation commenced after a congressional request under subsection (g), the Attorney General shall make such determination not later than 90 days after the request is received. The Attorney General shall promptly notify the division of the court specified in section 593(a) of the commencement of such preliminary investigation and the date of such commencement.

#### (2) Limited authority of Attorney General.—

(A) In conducting preliminary investigations under

this chapter, the Attorney General shall have no authority to convene grand juries, plea bargain, grant immunity, or issue subpoenas.

(B)(i) The Attorney General shall not base a determination under this chapter that information with respect to a violation of criminal law by a person is not specific and from a credible source upon a determination that such person lacked the state of mind required for the violation of criminal law.

(ii) The Attorney General shall not base a determination under this chapter that there are no reasonable grounds to believe that further investigation is warranted, upon a determination that such person lacked the state of mind required for the violation of criminal law involved, unless there is clear and convincing evidence that the person lacked such state of mind.

(3) **Extension of time for preliminary investigation.**—The Attorney General may apply to the division of the court for a single extension, for a period of not more than 60 days, of the 90-day period referred to in paragraph (1). The division of the court may, upon a showing of good cause, grant such extension.

#### (b) Determination that further investigation not warranted.—

(1) **Notification of division of the court.**—If the Attorney General, upon completion of a preliminary investigation under this chapter, determines that there are no reasonable grounds to believe that further investigation is warranted, the Attorney General shall promptly so notify the division of the court, and the division of the court shall have no power to appoint an independent counsel with respect to the matters involved.

(2) **Form of notification.**—Such notification shall contain a summary of the information received and a summary of the results of the preliminary investigation.

#### (c) Determination that further investigation is warranted.—

(1) **Application for appointment of independent counsel.**—The Attorney General shall apply to the division of the court for the appointment of an independent counsel if—

(A) the Attorney General, upon completion of a preliminary investigation under this chapter, determines that there are reasonable grounds to believe that further investigation is warranted; or

(B) the 90-day period referred to in subsection (a)(1), and any extension granted under subsection (a)(3), have elapsed and the Attorney

adjudication, where former staff member failed to allege sufficient hardship to warrant anticipatory judicial involvement in ongoing criminal investigation which had not resulted in indictment or criminal prosecution. *North v. Walsh*, D.D.C.1987, 656 F.Supp. 414.

#### 4. Purpose

Fundamental purpose of this chapter is to ensure that serious allegations of unlawful conduct by federal executive officials are subject to review by counsel independent of any incumbent administration. *Dellums v. Smith*, D.C.Cal.1984, 577 F.Supp. 1449, reversed on other grounds 797 F.2d 817.

#### 5. Persons or entities subject to investigation

The United States Department of Justice would not be a proper subject for investigation by an independent counsel. *In re INSLAW, Inc.*, 1989, 885 F.2d 880, 280 U.S.App.D.C. 258.

#### 6. Liability for investigation

Two assistant United States attorneys who were acting within scope of their duties concerning investigation of plaintiffs were not liable for defamation when allegations against plaintiffs were publicized by mailing of letter to United States Attorney General informing him of allegations and requesting an investigation pursuant to Ethics in Government Act. *Schiavone v. Montuoro*, D.C.N.Y. 1984, 587 F.Supp. 66.

#### 7. Judicial review

Ethics in Government Act precluded judicial review, at behest of members of the public, of Attorney General's decisions not to investigate allegations of wrongdoing during 1980 presidential campaign by several persons who were currently high-ranking officers of federal government and not to seek appointment of independent counsel with respect to officials covered by the Act. *Banzhaf v. Smith*, 1984, 737 F.2d 1167, 238 U.S.App.D.C. 20.

#### 8. Persons entitled to maintain action

Private citizens lacked standing to challenge refusal by Attorney General to conduct preliminary investigation required under Ethics in Government Act to determine whether the President and other high-level federal executive officials had violated the Neutrality Act vis-a-vis Nicaragua. *Dellums v. Smith*, C.A.9 (Cal.) 1986, 797 F.2d 817.

#### 9. Mandamus

District court judgment, which granted in part motion for summary judgment by plaintiffs seeking mandamus to compel Attorney General, pursuant to the Ethics in Government Act, to conduct preliminary investigation into charges against the Attorney General, assistant Attorney General and Director of the Federal Bureau of Investigation arising out of incident in which a number of persons were killed or wounded by members of the Ku Klux Klan and the American Nazi Party, would be reversed. *Nathan v. Smith*, 1984, 737 F.2d 1069, 237 U.S.App.D.C. 364.

### § 592. Preliminary investigation and application for appointment of an independent counsel

#### (a) Conduct of preliminary investigation.—

(1) **In general.**—A preliminary investigation conducted under this chapter shall be of such matters as the Attorney General considers appropriate in order to make a determination, under subsection (b) or (c), on whether further investigation is warranted, with respect to each potential violation, or allegation of a violation, of criminal law. The Attorney General shall make such determination not later than 90 days after the preliminary investigation is commenced, except that, in the case of a preliminary investigation commenced after a congressional request under subsection (g), the Attorney General shall make such determination not later than 90 days after the request is re-

ceived. The Attorney General shall promptly notify the division of the court specified in section 593(a) of the commencement of such preliminary investigation and the date of such, commencement.

(2) **Limited authority of Attorney General.**—(A) In conducting preliminary investigations under this chapter, the Attorney General shall have no authority to convene grand juries, plea bargain, grant immunity, or issue subpoenas.

(B)(i) The Attorney General shall not base a determination under this chapter that information with respect to a violation of criminal law by a person is not specific and from a credible source upon a determination that such person lacked the state of mind required for the violation of criminal law.

(ii) The Attorney General shall not base a determination under this chapter that there are no reasonable grounds to believe that further investigation is warranted, upon a determination that such person lacked the state of mind required for the violation of criminal law involved, unless there is clear and convincing evidence that the person lacked such state of mind.

(3) **Extension of time for preliminary investigation.**—The Attorney General may apply to the division of the court for a single extension, for a period of not more than 60 days, of the 90-day period referred to in paragraph (1). The division of the court may, upon a showing of good cause, grant such extension.

#### (b) Determination that further investigation not warranted.—

(1) **Notification of division of the court.**—If the Attorney General, upon completion of a preliminary investigation under this chapter, determines that there are no reasonable grounds to believe that further investigation is warranted, the Attorney General shall promptly so notify the division of the court, and the division of the court shall have no power to appoint an independent counsel with respect to the matters involved.

(2) **Form of notification.**—Such notification shall contain a summary of the information received and a summary of the results of the preliminary investigation.

#### (c) Determination that further investigation is warranted.—

(1) **Application for appointment of independent counsel.**—The Attorney General shall apply to the division of the court for the appointment of an independent counsel if—

(A) the Attorney General, upon completion of a preliminary investigation under this chapter, determines that there are reasonable grounds to believe that further investigation is warranted; or

(B) the 90-day period referred to in subsection (a)(1), and any extension granted under subsection (a)(3), have elapsed and the Attorney General has not filed a notification with the division of the court under subsection (b)(1).

In determining under this chapter whether reasonable grounds exist to warrant further investigation, the Attorney General shall comply with the written or other established policies of the Department of Justice with respect to the conduct of criminal investigations.

**(2) Receipt of additional information.**—If, after submitting a notification under subsection (b)(1), the Attorney General receives additional information sufficient to constitute grounds to investigate the matters to which such notification related, the Attorney General shall—

(A) conduct such additional preliminary investigation as the Attorney General considers appropriate for a period of not more than 90 days after the date on which such additional information is received; and

(B) otherwise comply with the provisions of this section with respect to such additional preliminary investigation to the same extent as any other preliminary investigation under this section.

**(d) Contents of application.**—Any application for the appointment of an independent counsel under this chapter shall contain sufficient information to assist the division of the court in selecting an independent counsel and in defining that independent counsel's prosecutorial jurisdiction so that the independent counsel has adequate authority to fully investigate and prosecute the subject matter and all matters related to that subject matter.

**(e) Disclosure of information.**—Except as otherwise provided in this chapter, no officer or employee of the Department of Justice or an office of independent counsel may, without leave of the division of the court, disclose to any individual outside the Department of Justice or such office any notification, application, or any other document, materials, or memorandum supplied to the division of the court under this chapter. Nothing in this chapter shall be construed as authorizing the withholding of information from the Congress.

**(f) Limitation on judicial review.**—The Attorney General's determination under this chapter to apply to the division of the court for the appointment of an independent counsel shall not be reviewable in any court.

**(g) Congressional request.—**

**(1) By Judiciary Committee or members thereof.**—The Committee on the Judiciary of either House of the Congress, or a majority of majority party members or a majority of all nonmajority party members of either such committee, may request in writing that the Attorney General apply for the appointment of an independent counsel.

**(2) Report by Attorney General pursuant to request.**—Not later than 30 days after the receipt of a request under paragraph (1), the Attorney General shall submit, to the committee making the request, or to the committee on which the persons making the request serve, a report on whether the Attorney General has begun or will begin a preliminary investigation under this chapter of the matters with respect to which the request is made, in accordance with subsection (a) or (c) of section 591, as the case may be. The report shall set forth the reasons for the Attorney General's decision regarding such preliminary investigation as it relates to each of the matters with respect to which the congressional request is made. If there is such a preliminary investigation, the report shall include the date on which the preliminary investigation began or will begin.

**(3) Submission of information in response to congressional request.**—At the same time as any notification, application, or any other document, material, or memorandum is supplied to the division of the court pursuant to this section with respect to a preliminary investigation of any matter with respect to which a request is made under paragraph (1), such notification, application, or other document, material, or memorandum shall be supplied to the committee making the request, or to the committee on which the persons making the request serve. If no application for the appointment of an independent counsel is made to the division of the court under this section pursuant to such a preliminary investigation, the Attorney General shall submit a report to that committee stating the reasons why such application was not made, addressing each matter with respect to which the congressional request was made.

**(4) Disclosure of information.**—Any report, notification, application, or other document, material, or memorandum supplied to a committee under this subsection shall not be revealed to any third party, except that the committee may, either on its own initiative or upon the request of the Attorney General, make public such portion or portions of such report, notification, application, or other document, material, or memorandum as will



not in the committee's judgment prejudice the rights of any individual.

(Added Pub.L. 95-521, Title VI, § 601(a), Oct. 26, 1978, 92 Stat. 1868, and amended Pub.L. 97-409, §§ 2(a)(1), 4(b)-(e), Jan. 3, 1983, 96 Stat. 2039-2041; Pub.L. 100-191, § 2, Dec. 15, 1987, 101 Stat. 1295.)

## HISTORICAL AND STATUTORY NOTES

**Revision Notes and Legislative Reports**  
1978 Acts. Senate Report Nos. 95-170 and 95-273, and House Conference Report No. 95-1756, see 1978 U.S. Code Cong. and Adm. News, p. 4216.

1983 Acts. Senate Report No. 97-496, see 1982 U.S. Code Cong. and Adm. News, p. 3537.

1987 Acts. Senate Report No. 100-123, House Conference Report No. 100-452, and Statement by President, see 1987 U.S. Code Cong. and Adm. News, p. 2150.

### Amendments

**1987 Amendments.** Catchline. Pub.L. 100-191 substituted "Preliminary investigation and application for appointment of an independent counsel" for "Application for appointment of a independent counsel".

Subsec. (a). Pub.L. 100-191 added subsec. (a) heading.

Subsec. (a)(1). Pub.L. 100-191 added par. (1) heading and, in text, substituted provisions directing that a preliminary investigation conducted under this chapter shall be of such matters as the Attorney General considers appropriate in order to make a determination, under subsection (b) or (c), on whether further investigation is warranted, with respect to each potential violation, or allegation of a violation, of criminal law, that the Attorney General shall make such determination not later than 90 days after the preliminary investigation is commenced, except in the case of a preliminary investigation commenced after a congressional request under subsection (g), the Attorney General shall make such determination not later than 90 days after the request is received, and that the Attorney General shall promptly notify the division of the court specified in section 593(a) of the commencement of such preliminary investigation and the date of such commencement, for provisions which had directed that, upon receiving information that the Attorney General determined was sufficient to constitute

grounds to investigate that any person covered by the Act had engaged in conduct described in subsection (a) or (c) of section 591 of this title (such determination based upon stated factors), the Attorney General had to conduct, for a period not to exceed ninety days, such preliminary investigation of the matter as the Attorney General deemed appropriate.

Subsec. (a)(2). Pub.L. 100-191 added par. (2) heading.

Subsec. (a)(2)(A). Pub.L. 100-191 designated the existing provisions of subsec. (a)(2) as subpar. (A) and, in subpar. (A) as so designated, substituted "preliminary investigations under this chapter" for "preliminary investigations pursuant to this section" and "subpoenas" for "subpenas".

Subsec. (a)(2)(B). Pub.L. 100-191 added subpar. (B).

Subsec. (a)(3). Pub.L. 100-191 added par. (3).

Subsec. (b). Pub.L. 100-191 added headings for subsec. (b) and pars. (1) and (2), re-enacted the text of subsec. (b)(1) and (2) substantially without change, and struck out former par. (3), prohibiting the revelation of memoranda to outside individuals without leave of the division of the court.

Subsec. (c). Pub.L. 100-191 added headings for subsec. (c) and for each of pars. (1) and (2) and re-enacted the text of subsec. (c)(1) and (2) substantially without change.

Subsec. (d). Pub.L. 100-191 added subsec. (d) heading, struck out the par. "(1)" designation preceding "Any application", re-enacted the text of former par. (1) substantially without change, and struck out former par. (2) relating to the prohibition upon the revelation of information to outside individuals without leave of the division of the court.

Subsec. (e). Pub.L. 100-191 added subsec. (e) heading and, in text, substituted

tuted provisions prohibiting the revelation of documents, materials, and memoranda to outside individuals without leave of the court (with exception relating to congress), for provisions relating to the referral to independent counsel by the Attorney General of matters within the independent counsel's prosecutorial jurisdiction.

Subsec. (f). Pub.L. 100-191 added subsec. (f) heading and re-enacted the text substantially without change.

Subsec. (g). Pub.L. 100-191 added subsec. (g).

**1983 Amendments.** Subsec. (a). Pub.L. 97-409, § 4(b), substituted direction, designated par. (1), that upon receiving information that the Attorney General determines is sufficient to constitute grounds to investigate that any person covered by the Act has engaged in conduct described in subsection (a) or (c) of section 591 of this title, the Attorney General shall conduct, for a period not to exceed ninety days, such preliminary investigation of the matter as the Attorney General deems appropriate, and that in determining whether grounds to investigate exist, the Attorney General shall consider the degree of specificity of the information received and the credibility of the source of the information for provision that the Attorney General, upon receiving specific information that any of the persons described in section 591(b) of this title had engaged in conduct described in section 591(a) of this title, was to conduct, for a period not to exceed ninety days, such preliminary investigation of the matter as the Attorney General deemed appropriate, and added par. (2).

Subsec. (b)(1). Pub.L. 97-409, § 2(a)(1)(A), substituted "independent counsel" for "special prosecutor".

Pub.L. 97-409, § 4(c), substituted "that there are no reasonable grounds to believe that further investigation or prosecution is warranted" for "that the matter is so unsubstantiated that no further investigation or prosecution is warranted".

Subsec. (c)(1). Pub.L. 97-409, § 2(a)(1)(A), substituted "independent counsel" for "special prosecutor".

Pub.L. 97-409, § 4(d), substituted "finds reasonable grounds to believe that further investigation or prosecution is warranted" for "finds the matter war-

rants further investigation or prosecution" after "preliminary investigation," and "that there are no reasonable grounds to believe that further investigation or prosecution is warranted" for "that the matter is so unsubstantiated as not to warrant further investigation or prosecution", and added provision that in determining whether reasonable grounds exist to warrant further investigation, the Attorney General shall comply with written or other established policies of the Department of Justice with respect to the enforcement of criminal laws.

Subsec. (c)(2). Pub.L. 97-409, § 2(a)(1)(A), substituted "independent counsel" for "special prosecutor" in the provisions following subpar. (B).

Subsec. (c)(2)(A). Pub.L. 97-409, § 4(e)(1), substituted "information sufficient to constitute grounds to investigate" for "specific information" after "receives additional".

Subsec. (c)(2)(B). Pub.L. 97-409, § 4(e)(2), substituted "reasonable grounds exist to warrant" for "such information warrants" after "appropriate, that".

Subsecs. (d)(1), (e). Pub.L. 97-409, § 2(a)(1)(A), substituted "independent counsel" for "special prosecutor" wherever appearing.

Pub.L. 97-409, § 2(a)(1)(B), substituted "independent counsels" for "special prosecutor's" wherever appearing.

Subsec. (f). Pub.L. 97-409, § 2(a)(1)(A), substituted "independent counsel" for "special prosecutor".

### Effective Dates

**1987 Acts.** Amendment by Pub.L. 100-191 to take effect on Dec. 15, 1987, and to apply only to new independent counsel proceedings and to new independent counsels coming into existence on and after Dec. 15, 1987, see section 6 of Pub.L. 100-191, set out as a note under section 591 of this title.

**1978 Acts.** Section effective Oct. 26, 1978, except for specific information received by the Attorney General pursuant to section 591 of this title based on determinations made by the Attorney General respecting such information, see section 604 of Pub.L. 95-521, set out as a note under section 591 of this title.



## LIBRARY REFERENCES

### American Digest System

Attorney general; powers and duties in general, see Attorney General ¶6.  
District and prosecuting attorneys; deputies, assistants, and substitutes, see District and Prosecuting Attorneys ¶3(1).

### Encyclopedias

Attorney general; powers and duties in general, see C.J.S. Attorney General § 7.  
District and prosecuting attorneys; deputies, assistants, and substitutes, see C.J.S. District and Prosecuting Attorneys § 27 et seq.

## WESTLAW ELECTRONIC RESEARCH

Attorney general cases: 46k[add key number].  
District and prosecuting attorneys cases: 131k[add key number].  
See, also, WESTLAW guide following the Explanation pages of this volume.

## NOTES OF DECISIONS

Constitutionality	1
Government employee status	2
Judicial review by district court	8
Jurisdiction of court of appeals	9
Liability for investigation	6
Mandamus	10
Necessity of investigation	3
Persons entitled to maintain action	7
Scope of investigation	5
Standing	7
Time for completion of investigation	4

### 1. Constitutionality

Miscellaneous functions granted to Special Division pursuant to Ethics in Government Act did not violate Article III prohibition against judicial exercise of executive powers in that such functions were either passive or essentially ministerial, and were analogous to functions that federal judges performed in other contexts. *Morrison v. Olson*, Dist. Col. 1988, 108 S.Ct. 2597, 487 U.S. 654, 101 L.Ed.2d 569, on remand 857 F.2d 801, 273 U.S.App.D.C. 10.

Former deputy chief of staff and United States presidential assistant's civil action to challenge constitutionality of independent counsel provisions of Ethics in Government Act, and seeking declaratory and injunctive relief from independent counsel's continued exercise of prosecutorial authority, was impermissible preemptive civil challenge to criminal proceedings before final judgment; Federal Rules of Criminal Procedure provided adequate, although limited, opportunity to challenge shortcomings in prosecutorial authority after conviction.

*Deaver v. Seymour*, 1987, 822 F.2d 66, 261 U.S.App.D.C. 334.

### 2. Government employee status

Judge's role as independent counsel charged with investigating conduct of government agencies in their handling of a particular matter was not a "position with the government" and, thus, did not violate rule for operation of independent review board, which was created by consent decree to rid union of organized crime influences, prohibiting member of board from holding any position with the government. *U.S. v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO*, S.D.N.Y. 1992, 808 F.Supp. 271.

### 3. Necessity of investigation

That investigative jurisdiction over additional targeted individual subject was being requested and obtained by referral to independent counsel did not eliminate necessity for compliance with requirement of Independent Counsel Reauthorization Act that there be preliminary investigation and finding of reasonable grounds to believe that further investigation or prosecution of targeted official, as subject of investigation, was warranted. *In re Meese*, 1990, 907 F.2d 1192, 285 U.S.App.D.C. 186.

### 4. Time for completion of investigation

Ninety-day period within which Justice Department had to complete its preliminary investigation of alleged wrongdoing within Department did not begin to run, for purpose of deciding whether Department's preliminary report was

timely filed or whether all of allegations in House Committee report should have been automatically referred to Independent Counsel for investigation, until Department had been given "reasonable time" within which to evaluate House Committee's 3,000 page report on wrongdoing. *In re Olson*, 1987, 818 F.2d 34, 260 U.S.App.D.C. 168.

The ninety-day period referred to in subsec. (c)(1) of this section for the Attorney-General's preliminary investigation should be computed from the day when the specific information is effectively received by the Department of Justice. 1981 (Counsel-Inf. Op.) 5 Op.O.L.C. 397.

### 5. Scope of investigation

Charges in indictment arising from Iran-Contra affair did not fall outside the area authorized by the Attorney General in his request of the Special Division with respect to appointment of independent counsel and, in any event, the Ethics in Government Act did not require the Special Division to adopt verbatim the recommendations of the Attorney General in defining independent counsel's jurisdiction. *U.S. v. North*, D.D.C. 1988, 708 F.Supp. 387.

### 6. Liability for investigation

Two assistant United States attorneys who were acting within scope of their duties concerning investigation of plaintiffs were not liable for defamation when allegations against plaintiffs were publicized by mailing of letter to United States Attorney General informing him of allegations and requesting an investigation pursuant to this chapter. *Schiavone v. Montuoro*, D.C.N.Y. 1984, 587 F.Supp. 66.

### 7. Persons entitled to maintain action

Private citizen has no standing to seek appointment of independent counsel, absent request by Attorney General. *In re Visser*, 1992, 968 F.2d 1319, 297 U.S.App. D.C. 37.

Ethics in Government Act did not confer standing on private citizens to sue special division to compel it to appoint independent counsel in order to investigate alleged evidence of misconduct by federal judges; court did not have jurisdiction to appoint independent counsel, and application by private citizen was not authorized by Act. *In re Kaminski*,

1992, 960 F.2d 1062, 295 U.S.App.D.C. 135.

Government contractor, as private party, lacked standing under Independent Counsel Act to compel United States Attorney General to conduct preliminary investigation or to appoint independent counsel to conduct investigation into alleged misconduct in contract dispute with Department of Justice. *In re IN-SLAW, Inc.*, 1989, 885 F.2d 880, 280 U.S.App.D.C. 258.

Private citizens lacked standing to challenge refusal by Attorney General to conduct preliminary investigation required under Ethics in Government Act to determine whether the President and other high-level federal executive officials had violated the Neutrality Act vis-a-vis Nicaragua. *Dellums v. Smith*, C.A.9 (Cal.) 1986, 797 F.2d 817.

The Ethics in Government Act did not create a private right of action to compel the Attorney General to investigate specific allegations of wrongdoing by federal officials. *Beauchamp v. Meese*, N.D.Ill. 1987, 657 F.Supp. 1263.

### 8. Judicial review by district court

This chapter precluded judicial review, at behest of members of the public, of Attorney General's decisions not to investigate allegations of wrongdoing during 1980 presidential campaign by several persons who were currently high-ranking officers of federal government and not to seek appointment of independent counsel with respect to officials covered by this chapter. *Banzhaf v. Smith*, 1984, 737 F.2d 1167, 238 U.S.App. D.C. 20.

### 9. Jurisdiction of court of appeals

Court of Appeals did not have jurisdiction to appoint independent counsel to investigate and prosecute clerks or other judges, absent application from Attorney General requesting such appointment. *In re Visser*, 1992, 968 F.2d 1319, 297 U.S.App.D.C. 37.

### 10. Mandamus

District court judgment, which granted in part motion for summary judgment by plaintiffs seeking mandamus to compel Attorney General, pursuant to this chapter, to conduct preliminary investigation into charges against the Attorney General, assistant Attorney General and Director of the Federal Bureau of Inves-

tigation arising out of incident in which a number of persons were killed or wounded by members of the Ku Klux Klan and the American Nazi Party,

would be reversed. Nathan v. Smith, 1984, 737 F.2d 1069, 237 U.S.App.D.C. 364.

### § 593. Duties of the division of the court

(a) **Reference to division of the court.**—The division of the court to which this chapter refers is the division established under section 49 of this title.

(b) **Appointment and jurisdiction of independent counsel.**—

(1) **Authority.**—Upon receipt of an application under section 592(c), the division of the court shall appoint an appropriate independent counsel and shall define that independent counsel's prosecutorial jurisdiction.

(2) **Qualifications of independent counsel.**—The division of the court shall appoint as independent counsel an individual who has appropriate experience and who will conduct the investigation and any prosecution in a prompt, responsible, and cost-effective manner. The division of the court shall seek to appoint as independent counsel an individual who will serve to the extent necessary to complete the investigation and any prosecution without undue delay. The division of the court may not appoint as an independent counsel any person who holds any office of profit or trust under the United States.

(3) **Scope of prosecutorial jurisdiction.**—In defining the independent counsel's prosecutorial jurisdiction, the division of the court shall assure that the independent counsel has adequate authority to fully investigate and prosecute the subject matter with respect to which the Attorney General has requested the appointment of the independent counsel, and all matters related to that subject matter. Such jurisdiction shall also include the authority to investigate and prosecute Federal crimes, other than those classified as Class B or C misdemeanors or infractions, that may arise out of the investigation or prosecution of the matter with respect to which the Attorney General's request was made, including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses.

(4) **Disclosure of identity and prosecutorial jurisdiction.**—An independent counsel's identity and prosecutorial jurisdiction (including any expansion under subsection (c)) may not be made public except upon the request of the Attorney General or upon a determination of the division of the court that disclosure of the identity and prosecutorial jurisdiction of such independent counsel would be in the best interests of justice. In

any event, the identity and prosecutorial jurisdiction of such independent counsel shall be made public when any indictment is returned, or any criminal information is filed, pursuant to the independent counsel's investigation.

→ (c) **Expansion of jurisdiction.**—

(1) **In general.**—The division of the court, upon the request of the Attorney General, may expand the prosecutorial jurisdiction of an independent counsel, and such expansion may be in lieu of the appointment of another independent counsel.

(2) **Procedure for request by independent counsel.**—(A) If the independent counsel discovers or receives information about possible violations of criminal law by persons as provided in section 591, which are not covered by the prosecutorial jurisdiction of the independent counsel, the independent counsel may submit such information to the Attorney General. The Attorney General shall then conduct a preliminary investigation of the information in accordance with the provisions of section 592, except that such preliminary investigation shall not exceed 30 days from the date such information is received. In making the determinations required by section 592, the Attorney General shall give great weight to any recommendations of the independent counsel.

(B) If the Attorney General determines, after according great weight to the recommendations of the independent counsel, that there are no reasonable grounds to believe that further investigation is warranted, the Attorney General shall promptly so notify the division of the court and the division of the court shall have no power to expand the jurisdiction of the independent counsel or to appoint another independent counsel with respect to the matters involved.

(C) If—

(i) the Attorney General determines that there are reasonable grounds to believe that further investigation is warranted; or

(ii) the 30-day period referred to in subparagraph (A) elapses without a notification to the division of the court that no further investigation is warranted,

the division of the court shall expand the jurisdiction of the appropriate independent counsel to include the matters involved or shall appoint another independent counsel to investigate such matters.

(d) **Return for further explanation.**—Upon receipt of a notification under section 592 or subsection (c)(2)(B) of this section from

the Attorney General that there are no reasonable grounds to believe that further investigation is warranted with respect to information received under this chapter, the division of the court shall have no authority to overrule this determination but may return the matter to the Attorney General for further explanation of the reasons for such determination.

(e) **Vacancies.**—If a vacancy in office arises by reason of the resignation, death, or removal of an independent counsel, the division of the court shall appoint an independent counsel to complete the work of the independent counsel whose resignation, death, or removal caused the vacancy, except that in the case of a vacancy arising by reason of the removal of an independent counsel, the division of the court may appoint an acting independent counsel to serve until any judicial review of such removal is completed.

(f) **Attorneys' fees.**—

(1) **Award of fees.**—Upon the request of an individual who is the subject of an investigation conducted by an independent counsel pursuant to this chapter, the division of the court may, if no indictment is brought against such individual pursuant to that investigation, award reimbursement for those reasonable attorneys' fees incurred by that individual during that investigation which would not have been incurred but for the requirements of this chapter. The division of the court shall notify the Attorney General of any request for attorneys' fees under this subsection.

(2) **Evaluation of fees.**—The division of the court may direct the Attorney General to file a written evaluation of any request for attorneys' fees under this subsection, analyzing for each expense—

- (A) the sufficiency of the documentation;
- (B) the need or justification for the underlying item; and
- (C) the reasonableness of the amount of money requested.

(g) **Disclosure of information.**—The division of the court may, subject to section 594(h)(2), allow the disclosure of any notification, application, or any other document, material, or memorandum supplied to the division of the court under this chapter.

(h) **Amicus curiae briefs.**—When presented with significant legal issues, the division of the court may disclose sufficient information about the issues to permit the filing of timely amicus curiae briefs.

(Added Pub.L. 95-521, Title VI, § 601(a), Oct. 26, 1978, 92 Stat. 1869, and amended Pub.L. 97-409, §§ 2(a)(1), 5, Jan. 3, 1983, 96 Stat. 2039, 2041; Pub.L. 100-191, § 2, Dec. 15, 1987, 101 Stat. 1297)

## HISTORICAL AND STATUTORY NOTES

**Revision Notes and Legislative Reports**  
1978 Acts. Senate Report Nos. 95-170 and 95-273, and House Conference Report No. 95-1756, see 1978 U.S. Code Cong. and Adm. News, p. 4216.

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1987 Acts. Senate Report No. 100-123, House Conference Report No. 100-452, and Statement by President see 1987 U.S. Code Cong. and Adm. News, p. 2150.

### Amendments

1987 Amendments. Catchline. Pub.L. 100-191 re-enacted the section heading without change.

Subsec. (a). Pub.L. 100-191 added subsec. (a) heading and re-enacted the text without change.

Subsec. (b). Pub.L. 100-191 added subsec. (b) heading, designated existing provisions as pars. (1) and (4) and in pars. (1) and (4), as so designated, added par. headings and re-enacted such provisions substantially without change, and added pars. (2) and (3).

Subsec. (c). Pub.L. 100-191 added subsec. (c) heading.

Subsec. (c)(1). Pub.L. 100-191 designated existing provisions as par. (1), added a par. (1) heading, and re-enacted such provisions substantially without change.

Subsec. (c)(2). Pub.L. 100-191 added par. (2).

Subsec. (d). Pub.L. 100-191 added subsec. (d) heading, and substituted provisions authorizing the court to return the matter to the Attorney General for further explanation when the Attorney General notifies the court that there are no reasonable grounds to believe that further investigation is warranted with respect to information received under this chapter for former provisions which had directed that the court could not appoint as an independent counsel any person who recently held any office of profit or trust under the United States.

Subsec. (e). Pub.L. 100-191 added subsec. (e) heading and re-enacted existing text substantially without change.

Subsec. (f)(1). Pub.L. 100-191 added subsec. and par. headings, and substituted provisions relating to attorneys' fees for provisions authorizing the granting of an extension of 60 days in the preliminary investigation.

Subsec. (f)(2). Pub.L. 100-191 added par. (2).

Subsec. (g). Pub.L. 100-191 added subsec. heading, and substituted provisions relating to the disclosure of information for provisions relating to attorneys' fees.

Subsec. (h). Pub.L. 100-191 added subsec. (h).

1983 Amendments. Subsec. (b). Pub.L. 97-409, § 2(a)(1), substituted "independent counsel" for "special prosecutor" and "independent counsel's" for "special prosecutor's" wherever appearing.

Subsecs. (c) to (e). Pub.L. 97-409, § 2(a)(1)(A), substituted "independent counsel" for "special prosecutor" wherever appearing.

Subsecs. (f), (g). Pub.L. 97-409, § 5, added subsecs. (f) and (g).

### Effective Dates

1987 Acts. Amendment by Pub.L. 100-191 to take effect on Dec. 15, 1987, and to apply only to new independent counsel proceedings and to new independent counsels coming into existence on and after Dec. 15, 1987, but with subsec. (f) applicable to previously initiated proceedings still pending on Dec. 15, 1987, see section 6 of Pub.L. 100-191, set out as a note under section 591 of this title.

1978 Acts. Section effective Oct. 26, 1978, except for specific information received by the Attorney General pursuant to section 591 of this title based on determinations made by the Attorney General respecting such information, see section 604 of Pub.L. 95-521, set out as a note under section 591 of this title.

### CROSS REFERENCES

Application for order from special prosecutor appointed under this section for disclosure of return and information other than taxpayer return information for use in criminal investigations, see 26 USCA § 6103.



## LIBRARY REFERENCES

## American Digest System

District and prosecuting attorneys; deputies, assistants, and substitutes, see District and Prosecuting Attorneys § 3(1).  
Federal courts; jurisdiction and powers generally, see Federal Courts § 1 et seq.

## Encyclopedias

District and prosecuting attorneys; deputies, assistants, and substitutes, see C.J.S. District and Prosecuting Attorneys § 27 et seq.  
Federal courts; jurisdiction and powers generally, see C.J.S. Federal Courts § 4(1) et seq.

## WESTLAW ELECTRONIC RESEARCH

District and prosecuting attorneys cases: 131k[add key number].  
Federal courts cases: 170bk[add key number].  
See, also, WESTLAW guide following the Explanation pages of this volume.

## NOTES OF DECISIONS

## I. GENERALLY 1-20

## II. ATTORNEY FEES 21-END

*For Detailed Alphabetical Note Index, see the Various Subdivisions.*

## I. GENERALLY

## Subdivision Index

Constitutionality 1  
Jurisdiction of independent counsel 3  
Power of Special Division 2  
Submission of information 4

## 1. Constitutionality

Congress acted within its authority under appointments clause in creating Special Division with authority to appoint independent counsel to investigate misconduct in Executive Branch, provided that such counsel's jurisdiction be related to factual circumstances giving rise to Attorney General's request for appointment. *Morrison v. Olson*, Dist.Col.1988, 108 S.Ct. 2597, 487 U.S. 654, 101 L.Ed.2d 569, on remand 857 F.2d 801, 273 U.S.App.D.C. 10.

## 2. Power of Special Division

Special Division has no authority to take any action or undertake any duties that are not specifically authorized by Ethics in Government Act. *Morrison v. Olson*, Dist.Col.1988, 108 S.Ct. 2597, 487

U.S. 654, 101 L.Ed.2d 569, on remand 857 F.2d 801, 273 U.S.App.D.C. 10.

## 3. Jurisdiction of independent counsel

Independent counsel possessed jurisdiction to prosecute defendant for perjury and obstruction arising out of his testimony before Congress; wording of special division's order outlining jurisdiction of independent counsel, and statutory authority underlying it, supported counsel's jurisdiction over matters "arising out of" and "related to" Iran-Contra initiative, and defendant's testimony bore "demonstrable relationship" with initiative. *U.S. v. Secord*, D.D.C.1989, 725 F.Supp. 563.

## 4. Submission of information

Forwarding of material by subordinate in Office of Independent Counsel to subordinate in Public Integrity Section of Department of Justice did not constitute formal submission to Attorney General such that Attorney General had duty to act under Independent Counsel Act to investigate alleged misconduct in contract dispute involving Department of Justice; material was forwarded "for such action, if any, that the might wish

to take. In re INSLAW, Inc., 1989, 885 F.2d 880, 280 U.S.App.D.C. 258.

## II. ATTORNEY FEES

## Subdivision Index

Accountant fees, compensable services 30  
Acquittal 24  
But for requirement  
Generally 25  
Duplicative investigations 26  
Similarity with costs of conventional investigation 27  
Vigorousness of investigation 28  
Compensable services  
Generally 29  
Accountant fees 30  
Preliminary investigation 31  
Preparation of attorney fees application 32  
Review of press clippings 33  
Construction 21  
Duplicative investigations, but for requirement 26  
Expenses 34  
Indictment 23  
Payment of fees 35  
Preliminary investigation, compensable services 31  
Preparation of attorney fees application, compensable services 32  
Retroactive effect 22  
Review of press clippings, compensable services 33  
Similarity with costs of conventional investigation, but for requirement 27  
Time of request 36  
Vigorousness of investigation, but for requirement 28

## 21. Construction

Waivers of sovereign immunity, granting right to petition Government for attorneys' fees, are to be strictly construed in favor of sovereign. In re Nofziger, 1991, 925 F.2d 428, 288 U.S.App.D.C. 197, rehearing denied 938 F.2d 1397, 291 U.S.App.D.C. 138.

As the attorney fee provision of the Independent Counsel Reauthorization Act is a waiver of sovereign immunity, it must be strictly construed. In re Olson, 1990, 892 F.2d 1073, 282 U.S.App.D.C. 139.

## 22. Retroactive effect

Subsec. (g) of this section providing for award of attorney fees to a person who is subject to investigation and who is not indicted is not to be applied retroactively to a case which was closed prior to 1984. In re Jordan, 1984, 745 F.2d 1574, 240 U.S.App.D.C. 437.

## 23. Indictment

Former high government official was not precluded from seeking statutory reimbursement of attorneys fees expended in connection with independent counsel's investigation of alleged illegal post-employment lobbying activities, even though he was ultimately indicted; indictment was found defective and intent of statute would be subverted by not extending it to cover official's situation. In re Nofziger, 1991, 925 F.2d 428, 288 U.S.App.D.C. 197, rehearing denied 938 F.2d 1397, 291 U.S.App.D.C. 138.

## 24. Acquittal

Fact that applicant was acquitted had no bearing on his right to be awarded attorney fees under the Ethics Act, as the statute limits attorney fees to subjects who have not been validly indicted. In re Nofziger, 1992, 956 F.2d 287, 294 U.S.App.D.C. 1.

## 25. But for requirement—Generally

Within section of the Ethics in Government Act allowing reimbursement of attorney fees to government official who is subject of investigation conducted by independent counsel if no indictment is brought and fees would not have been incurred but for the requirements of the Act, attorney services challenging the constitutionality of the Act would not satisfy the "but for" requirement; it is the character of the investigation and prosecution of the subject upon which compliance with "but for" requirement depends, and defense tactics employed by defense counsel cannot satisfy the requirement. In re Nofziger, 1991, 938 F.2d 1397, 291 U.S.App.D.C. 138.

Reasonable attorneys' fees incurred during initial investigation by independent counsel which ended with independent counsel's announcement that Assistant Attorney General's testimony before Congress probably did not constitute a prosecutable violation of federal criminal law, satisfied the "but for" requirement for recovery of attorney fees and were compensable under Independent Counsel Reauthorization Act. In re Olson, 1989, 884 F.2d 1415, 280 U.S.App.D.C. 205.

## 26. — Duplicative investigations

Fact that investigation by Public Integrity Section of Department of Justice was conducted and that it did not recommend prosecution of Department official

established that, in the investigation conducted by Independent Counsel, the official was being subjected to expenses for a duplicative investigation that he would not have been subject to in the absence of the Ethics in Government Act and thus satisfied the "but for" requirement for an unindicted investigation subject to recover attorney fees under the Independent Counsel Reauthorization Act. In re Olson, 1990, 892 F.2d 1073, 282 U.S.App.D.C. 139.

**27. — Similarity with costs of conventional investigation**

Former high government employee who was prosecuted for communicating with agency with which he was formerly employed within one year after leaving government service failed to show that attorney fees were incurred by him during independent counsel investigation that would not have been incurred but for requirements of the Ethics in Government Act, so as to qualify him for attorney fees when, following reversal of convictions, independent counsel declined further prosecution and indictments were dismissed with prejudice; record demonstrated that, in absence of the Act, official would nonetheless have been investigated and prosecuted by Department of Justice under statute which includes private citizens. In re Nofziger, 1991, 938 F.2d 1397, 291 U.S.App.D.C. 138.

Attorneys fees incurred in connection with independent counsel investigation of government official's allegedly illegal lobbying activities were not reimbursable under statute allowing recovery of fees which would not have been incurred "but for" investigation; there was nothing in the investigation, indictments, time or effort expended by government, types of inquiries conducted, or results which were materially different from those which would have resulted from a conventional Department of Justice investigation. In re Nofziger, 1991, 925 F.2d 428, 288 U.S.App.D.C. 197, rehearing denied 938 F.2d 1397, 291 U.S.App.D.C. 138.

**28. — Vigorousness of investigation**

United States Attorney General was entitled to recover attorney fees and costs incurred in connection with investigation by independent counsel as to whether Attorney General, as counselor

to President, violated conflict of interest laws in assisting minority-owned corporation in its efforts to obtain government defense contracts; no indictment was brought against Attorney General upon completion of investigation and basis upon which referral was made and extreme expansion of resulting investigation subjected Attorney General to more vigorous application of criminal law than was applied to other citizens and caused him to incur legal expenses no ordinary citizen would have incurred but for independent counsel statute. In re Meese, 1990, 907 F.2d 1192, 285 U.S.App.D.C. 186.

**29. Compensable services—Generally**

Government official who has been subject of investigation conducted by independent counsel cannot recover reimbursement for attorney fees that are inherent in every independent counsel investigation, such as fees for services rendered in reviewing the Ethics in Government Act and discussing strategy vis-a-vis the independent counsel. In re Nofziger, 1991, 938 F.2d 1397, 291 U.S.App.D.C. 138.

**30. — Accountants fees**

Fees for work performed by "accountant/attorneys" were reimbursable under Independent Counsel Reauthorization Act as "reasonable attorneys' fees" in tax case. In re Sealed Case, 1989, 890 F.2d 451, 281 U.S.App.D.C. 334.

**31. — Preliminary investigation**

Attorney services provided, immediately prior to and in anticipation of appointment of independent counsel, to government official who becomes subject of independent counsel investigation are not compensable under the Ethics in Government Act. In re Nofziger, 1991, 938 F.2d 1397, 291 U.S.App.D.C. 138.

Independent Counsel Reauthorization Act did not authorize award of attorney fees incurred during preliminary investigation conducted by Attorney General. In re Sealed Case, 1989, 890 F.2d 451, 281 U.S.App.D.C. 334.

**32. — Preparation of attorney fees application**

United States Attorney General, in recovering attorney fees under Independent Counsel Reauthorization Act, was not entitled to recover fees for services rendered by independent counsel, as

applications; those fees were not for services rendered in asserting merits of Attorney General's defense to independent counsel investigation. In re Meese, 1990, 907 F.2d 1192, 285 U.S.App.D.C. 186.

**33. — Review of press clippings**

Fees incurred by United States Attorney General's attorneys in reviewing press clippings concerning independent counsel investigation, because of heavy media involvement, provided useful and important information that assisted counsel in representation of subject and was therefore reasonably related to defense of investigation and were recoverable under Independent Counsel Reauthorization Act. In re Meese, 1990, 907 F.2d 1192, 285 U.S.App.D.C. 186.

**34. Expenses**

Expenses for business meals, support staff overtime, service fee, supplies, and photocopying were excessive or unnecessary and could not be fully recovered by United States Attorney General under Independent Counsel Reauthorization Act.

In re Meese, 1990, 907 F.2d 1192, 285 U.S.App.D.C. 186.

**35. Payment of fees**

Subject of independent counsel investigation need not have paid attorney fees before reimbursement can be sought under Independent Counsel Reauthorization Act; rather, subject need only be legally liable for fees incurred by representation during investigation. In re Donovan, 1989, 877 F.2d 982, 278 U.S.App.D.C. 194.

**36. Time of request**

Request for attorney fees made by individuals who testified under grant of transactional immunity in investigation conducted by independent counsel was premature; while individuals had not been indicted, indictment was still possible, it was not clear that fees would have been incurred in absence of independent counsel law, or whether applicants were subjects of grand jury investigation and it was inopportune time to interrupt ongoing investigation to embark on extensive collateral fee inquiry. In re North, 1988, 842 F.2d 340, 268 U.S.App.D.C. 344.

**§ 594. Authority and duties of an independent counsel**

(a) **Authorities.**—Notwithstanding any other provision of law, an independent counsel appointed under this chapter shall have, with respect to all matters in such independent counsel's prosecutorial jurisdiction established under this chapter, full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice, except that the Attorney General shall exercise direction or control as to those matters that specifically require the Attorney General's personal action under section 2516 of title 18. Such investigative and prosecutorial functions and powers shall include—

(1) conducting proceedings before grand juries and other investigations;

(2) participating in court proceedings and engaging in any litigation, including civil and criminal matters, that such independent counsel considers necessary;

(3) appealing any decision of a court in any case or proceeding in which such independent counsel participates in an official capacity;

(4) reviewing all documentary evidence available from any source;

(5) determining whether to contest the assertion of any testimonial privilege;

(6) receiving appropriate national security clearances and, if necessary, contesting in court (including, where appropriate, participating in in camera proceedings) any claim of privilege or attempt to withhold evidence on grounds of national security;

(7) making applications to any Federal court for a grant of immunity to any witness, consistent with applicable statutory requirements, or for warrants, subpoenas, or other court orders, and, for purposes of sections 6003, 6004, and 6005 of title 18, exercising the authority vested in a United States attorney or the Attorney General;

(8) inspecting, obtaining, or using the original or a copy of any tax return, in accordance with the applicable statutes and regulations, and, for purposes of section 6103 of the Internal Revenue Code of 1986 and the regulations issued thereunder, exercising the powers vested in a United States attorney or the Attorney General;

(9) initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing informations, and handling all aspects of any case, in the name of the United States; and

(10) consulting with the United States attorney for the district in which any violation of law with respect to which the independent counsel is appointed was alleged to have occurred.

**(b) Compensation.**—An independent counsel appointed under this chapter shall receive compensation at the per diem rate equal to the annual rate of basic pay payable for level IV of the Executive Schedule under section 5315 of title 5.

**(c) Additional personnel.**—For the purposes of carrying out the duties of an office of independent counsel, such independent counsel may appoint, fix the compensation, and assign the duties of such employees as such independent counsel considers necessary (including investigators, attorneys, and part-time consultants). The positions of all such employees are exempted from the competitive service. No such employee may be compensated at a rate exceeding the maximum rate of pay payable for GS-18 of the General Schedule under section 5332 of title 5.

**(d) Assistance of Department of Justice.**—

**(1) In carrying out functions.**—An independent counsel may request assistance from the Department of Justice in carrying out the functions of the independent counsel, and the Department of Justice shall provide that assistance, which may include access to any records, files, or other materials relevant to matters within such independent counsel's prosecutorial jurisdiction, and the use of the resources and personnel necessary to perform such independent counsel's duties.

**(2) Payment of and reports on expenditures of independent counsel.**—The Department of Justice shall pay all costs relating to the establishment and operation of any office of independent counsel. The Attorney General shall submit to the Congress, not later than 30 days after the end of each fiscal year, a report on amounts paid during that fiscal year for expenses of investigations and prosecutions by independent counsel. Each such report shall include a statement of all payments made for activities of independent counsel but may not reveal the identity or prosecutorial jurisdiction of any independent counsel which has not been disclosed under section 593(b)(4).

**(e) Referral of other matters to an independent counsel.**—An independent counsel may ask the Attorney General or the division of the court to refer to the independent counsel matters related to the independent counsel's prosecutorial jurisdiction, and the Attorney General or the division of the court, as the case may be, may refer such matters. If the Attorney General refers a matter to an independent counsel on the Attorney General's own initiative, the independent counsel may accept such referral if the matter relates to the independent counsel's prosecutorial jurisdiction. If the Attorney General refers any matter to the independent counsel pursuant to the independent counsel's request, or if the independent counsel accepts a referral made by the Attorney General on the Attorney General's own initiative, the independent counsel shall so notify the division of the court.

**(f) Compliance with policies of the Department of Justice.**—An independent counsel shall, except where not possible, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws.

**(g) Dismissal of matters.**—The independent counsel shall have full authority to dismiss matters within the independent counsel's prosecutorial jurisdiction without conducting an investigation or at any subsequent time before prosecution, if to do so would be consistent with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws.



**(h) Reports by independent counsel.—****(1) Required reports.—**An independent counsel shall—

(A) file with the division of the court, with respect to the 6-month period beginning on the date of his or her appointment, and with respect to each 6-month period thereafter until the office of that independent counsel terminates, a report which identifies and explains major expenses, and summarizes all other expenses, incurred by that office during the 6-month period with respect to which the report is filed, and estimates future expenses of that office; and

(B) before the termination of the independent counsel's office under section 596(b), file a final report with the division of the court, setting forth fully and completely a description of the work of the independent counsel, including the disposition of all cases brought, and the reasons for not prosecuting any matter within the prosecutorial jurisdiction of such independent counsel.

**(2) Disclosure of information in reports.—**The division of the court may release to the Congress, the public, or any appropriate person, such portions of a report made under this subsection as the division of the court considers appropriate. The division of the court shall make such orders as are appropriate to protect the rights of any individual named in such report and to prevent undue interference with any pending prosecution. The division of the court may make any portion of a final report filed under paragraph (1)(B) available to any individual named in such report for the purposes of receiving within a time limit set by the division of the court any comments or factual information that such individual may submit. Such comments and factual information, in whole or in part, may, in the discretion of the division of the court, be included as an appendix to such final report.

**(i) Independence from Department of Justice.—**Each independent counsel appointed under this chapter, and the persons appointed by that independent counsel under subsection (c), are separate from and independent of the Department of Justice for purposes of sections 202 through 209 of title 18.

**(j) Standards of conduct applicable to independent counsel, persons serving in the office of an independent counsel, and their law firms.—**

**(1) Restrictions on employment while independent counsel and appointees are serving.—**(A) During the period in which an independent counsel is serving under this chapter—

(i) such independent counsel and

(ii) any person associated with a firm with which such independent counsel is associated,

may not represent in any matter any person involved in any investigation or prosecution under this chapter.

(B) During the period in which any person appointed by an independent counsel under subsection (c) is serving in the office of independent counsel, such person may not represent in any matter any person involved in any investigation or prosecution under this chapter.

**(2) Post employment restrictions on independent counsel and appointees.—**(A) Each independent counsel and each person appointed by that independent counsel under subsection (c) may not, for 3 years following the termination of the service under this chapter of that independent counsel or appointed person, as the case may be, represent any person in any matter if that individual was the subject of an investigation or prosecution under this chapter that was conducted by that independent counsel.

(B) Each independent counsel and each person appointed by that independent counsel under subsection (c) may not, for 1 year following the termination of the service under this chapter of that independent counsel or appointed person, as the case may be, represent any person in any matter involving any investigation or prosecution under this chapter.

**(3) One-year ban on representation by members of firms of independent counsel.—**Any person who is associated with a firm with which an independent counsel is associated or becomes associated after termination of the service of that independent counsel under this chapter may not, for 1 year following such termination, represent any person in any matter involving any investigation or prosecution under this chapter.

**(4) Definitions.—**For purposes of this subsection—

(A) the term "firm" means a law firm whether organized as a partnership or corporation; and

(B) a person is "associated" with a firm if that person is an officer, director, partner, or other member or employee of that firm.

**(k) Custody of records of an independent counsel.—**

**(1) Transfer of records.—**Upon termination of the office of an independent counsel, that independent counsel shall transfer to the Archivist of the United States all records which have been created or received by that office. Before this transfer, the independent counsel shall clearly identify which of these records are subject to rule 6(e) of the Federal Rules of Criminal

Procedure as grand jury materials and which of these records have been classified as national security information. Any records which were compiled by an independent counsel and, upon termination of the independent counsel's office, were stored with the division of the court or elsewhere before the enactment of the Independent Counsel Reauthorization Act of 1987, shall also be transferred to the Archivist of the United States by the division of the court or the person in possession of such records.

**(2) Maintenance, use, and disposal of records.**—Records transferred to the Archivist under this chapter shall be maintained, used, and disposed of in accordance with chapters 21, 29, and 33 of title 44.

**(3) Access to records.**—

**(A) In general.**—Subject to paragraph (4), access to the records transferred to the Archivist under this chapter shall be governed by section 552 of title 5.

**(B) Access by Department of Justice.**—The Archivist shall, upon written application by the Attorney General, disclose any such records to the Department of Justice for purposes of an ongoing law enforcement investigation or court proceeding, except that, in the case of grand jury materials, such records shall be so disclosed only by order of the court of jurisdiction under rule 6(e) of the Federal Rules of Criminal Procedure.

**(C) Exception.**—Notwithstanding any restriction on access imposed by law, the Archivist and persons employed by the National Archives and Records Administration who are engaged in the performance of normal archival work shall be permitted access to the records transferred to the Archivist under this chapter.

**(4) Records provided by Congress.**—Records of an investigation conducted by a committee of the House of Representatives or the Senate which are provided to an independent counsel to assist in an investigation or prosecution conducted by that independent counsel—

**(A)** shall be maintained as a separate body of records within the records of the independent counsel; and

**(B)** shall, after the records have been transferred to the Archivist under this chapter, be made available, except as provided in paragraph (3)(B) and (C), in accordance with the rules governing release of the records of the House of Congress that provided the records to the independent counsel.

Subparagraph (B) shall not apply to those records which have been surrendered pursuant to grand jury or court proceedings.

(Added Pub.L. 95-521, Title VI, § 601(a), Oct. 26, 1978, 92 Stat. 1869, and amended Pub.L. 97-409, §§ 2(a)(1), 6(a)–(c), Jan. 3, 1983, 96 Stat. 2039, 2041; Pub.L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095; Pub.L. 100-191, § 2, Dec. 15, 1987, 101 Stat. 1300.)

## HISTORICAL AND STATUTORY NOTES

**Revision Notes and Legislative Reports**  
1978 Acts. Senate Report Nos. 95-170 and 95-273, and House Conference Report No. 95-1756, see 1978 U.S. Code Cong. and Adm. News, p. 4216.

1983 Acts. Senate Report No. 97-496, see 1982 U.S. Code Cong. and Adm. News, p. 3537.

1987 Acts. Senate Report No. 100-123, House Conference Report No. 100-452, and Statement by President, see 1987 U.S. Code Cong. and Adm. News, p. 2150.

### References in Text

Section 6103 of the Internal Revenue Code of 1986, referred to in subsec. (a)(8), is classified to section 6103 of Title 26, Internal Revenue Code.

The Federal Rules of Criminal Procedure, referred to in subsec. (k)(1), (3)(B), are set out in Title 18, Crimes and Criminal Procedure.

The enactment of the Independent Counsel Reauthorization Act of 1987, referred to in subsec. (k)(1), is the enactment of Pub.L. 100-191, which was approved Dec. 15, 1987.

### References in Other Laws to GS-16, 17, or 18 Pay Rates

References in laws to the rates of pay for GS-16, 17, or 18, or to maximum rates of pay under the General Schedule, to be considered references to rates payable under specified sections of Title 5, Government Organization and Employees, see section 529 [Title I, § 101(c)(1)] of Pub.L. 101-509, set out in a note under section 5376 of Title 5.

### Amendments

**1987 Amendments.** Catchline. Pub.L. 100-191 substituted "an" for "a" preceding "independent counsel".

Subsec. (a). Pub.L. 100-191 added a subsec. (a) heading and re-enacted the existing text substantially without change.

Subsec. (b). Pub.L. 100-191 added a subsec. (b) heading and re-enacted the existing text substantially without change.

Subsec. (c). Pub.L. 100-191 added a subsec. (c) heading and re-enacted the existing text substantially without change.

Subsec. (d). Pub.L. 100-191 added a subsec. (d) heading.

Subsec. (d)(1). Pub.L. 100-191 designated the existing provisions of subsec. (d) as par. (1), re-enacted such provisions substantially without change, and added a par. (1) heading.

Subsec. (d)(2). Pub.L. 100-191 added par. (2).

Subsec. (e). Pub.L. 100-191 added a subsec. (e) heading and re-enacted existing text substantially without change.

Subsec. (f). Pub.L. 100-191 added a subsec. (f) heading and re-enacted existing text without change.

Subsec. (g). Pub.L. 100-191 added a subsec. (g) heading and re-enacted existing text substantially without change.

Subsec. (h) to (k). Pub.L. 100-191 added subsecs. (h) to (k).

**1986 Amendments.** Subsec. (a)(8). Pub.L. 99-514 substituted "Internal Revenue Code of 1986" for "Internal Revenue Code of 1954".

**1983 Amendments.** Catchline. Pub.L. 97-409, § 2(a)(1)(A), substituted "independent counsel" for "special prosecutor".

Subsec. (a). Pub.L. 97-409, § 2(a)(1), substituted "independent counsel" for "special prosecutor" wherever appearing and "independent counsel's" for "special prosecutor's".

Subsec. (a)(10). Pub.L. 97-409, § 6(a), added par. (10).

Subsecs. (b), (c). Pub.L. 97-409, § 2(a)(1)(A), substituted "independent



counsel" for "special prosecutor" wherever appearing.

Subsecs. (d), (e). Pub.L. 97-409, § 2(a)(1), substituted "independent counsel" for "special prosecutor" and "independent counsel's" for "special prosecutor's" wherever appearing.

Subsec. (f). Pub.L. 97-409, § 2(a)(1)(A), substituted "independent counsel" for "special prosecutor" wherever appearing.

Pub.L. 97-409, § 6(b), substituted "except where not possible" for "to the extent that such special prosecutor deems appropriate" after "shall," and "written or other established policies" for "written policies" after "comply with the".

Subsec. (g). Pub.L. 97-409, § 6(c), added subsec. (g).

#### Effective Dates

1987 Acts. Amendment by Pub.L. 100-191 effective Dec. 15, 1987, and applicable to proceedings initiated and independent counsels appointed on and af-

ter Dec. 15, 1987, but with the following provisions applicable to previously initiated proceedings pending on Dec. 15, 1987: subsec. (d)(2) (relating to reports by Attorney General on expenditures by independent counsel, except that the first such report shall be made only with respect to expenditures on or after Dec. 15, 1987), subsec. (h)(1)(A) except that the 6-month periods described in subsec. (h)(1)(A) of this section shall be calculated from Dec. 15, 1987, subsec. (i), subsec. (k) of this section, and 90 days after Dec. 15, 1987, subsec. (j), see section 6 of Pub.L. 100-191, set out as a note under section 591 of this title.

1978 Acts. Section effective Oct. 26, 1978, except for specific information received by the Attorney General pursuant to section 591 of this title based on determinations made by the Attorney General respecting such information, see section 604 of Pub.L. 95-521, set out as a note under section 591 of this title.

#### CROSS REFERENCES

Independent counsel appointed under this chapter included in term "special government employee" for purposes of Chapter 11, Bribery, Graft and Conflict of Interest, see 18 USCA § 202.

#### LIBRARY REFERENCES

##### American Digest System

District and prosecuting attorneys; deputies, assistants, and substitutes, see District and Prosecuting Attorneys ¶3(1).

##### Encyclopedias

District and prosecuting attorneys; deputies, assistants, and substitutes, see C.J.S. District and Prosecuting Attorneys § 27 et seq.

#### WESTLAW ELECTRONIC RESEARCH

District and prosecuting attorneys cases: 131k[add key number].  
See, also, WESTLAW guide following the Explanation pages of this volume.

#### NOTES OF DECISIONS

##### Appeals 2

##### Appointment of additional personnel 4

##### Disclosure of information 6

##### Indictments 3

##### Investigations 1

##### Justice Department enforcement policies 5

##### 1. Investigations

Members of Justice Department, who challenged authority or propriety of In-

dependent Counsel's investigation into alleged illegal activity in Department, could do so only after indictment, if any, was returned by grand jury. In re Olson, 1987, 818 F.2d 34, 260 U.S.App.D.C. 168.

##### 2. Appeals

Only special counsel, not Attorney General could appeal for the Government the court's ruling in prosecution governed by the Ethics in Government

Act. U.S. v. North, D.D.C.1989, 713 F.Supp. 1441.

#### 3. Indictments

Consolidation of indictment filed by the Office of Independent Counsel (OIC) charging three defendants with conspiracy and two with submitting false statements to the Department of Housing and Urban Development (DHUD), in connection with grant applications, with Department of Justice indictment charging two defendants with bribery and conspiracy would not subject the OIC to Department of Justice control, and thus would not violate the Ethics in Government Act, under which OIC was appointed. U.S. v. Briscoe, D.D.C.1992, 798 F.Supp. 28.

#### 4. Appointment of additional personnel

Fact that associate independent counsel are appointed by independent counsel and not special court does not invalidate their appointments under the Ethics in Government Act, as staff members of independent counsel, who has inferior officer, are not officers but mere employees of United States. In re Sealed Case, D.D.C.1987, 665 F.Supp. 56, re-

versed 838 F.2d 476, 267 U.S.App.D.C. 178, reversed 108 S.Ct. 2597, 487 U.S. 654, 101 L.Ed.2d 569, on remand 857 F.2d 801, 273 U.S.App.D.C. 10.

#### 5. Justice Department enforcement policies

Dismissal for failure to follow policies of Department of Justice of indictment charging violation of general federal false statement statute and obstruction of Congress was not warranted; very nature of independent counsel's responsibilities suggest that it may not always be possible for him to follow the policies of Department of Justice. U.S. v. Poin-dexter, D.D.C.1989, 725 F.Supp. 13.

#### 6. Disclosure of information

Even if showing of particularized need was required to authorize release to witness of witness' grand jury testimony in proceeding under Ethics in Government Act, record demonstrated that such need existed; subject matter of witness' testimony was important to investigation, and witness could have been named in independent counsel's public final report. In re Sealed Motion, 1989, 880 F.2d 1367, 279 U.S.App.D.C. 294.

## § 595. Congressional oversight

### (a) Oversight of conduct of independent counsel.—

(1) **Congressional oversight.**—The appropriate committees of the Congress shall have oversight jurisdiction with respect to the official conduct of any independent counsel appointed under this chapter, and such independent counsel shall have the duty to cooperate with the exercise of such oversight jurisdiction.

(2) **Reports to Congress.**—An independent counsel appointed under this chapter shall submit to the Congress such statements or reports on the activities of such independent counsel as the independent counsel considers appropriate.

(b) **Oversight of conduct of Attorney General.**—Within 15 days after receiving an inquiry about a particular case under this chapter, which is a matter of public knowledge, from a committee of the Congress with jurisdiction over this chapter, the Attorney General shall provide the following information to that committee with respect to that case:

(1) When the information about the case was received.



**FILED**  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF ARKANSAS

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF ARKANSAS  
WESTERN DIVISION

JAMES W. McCORMACK, CLERK  
BY: *[Signature]*  
DEPT. CLERK  
PLAINTIFF

UNITED STATES OF AMERICA

v.

LR-CR-95-173

JAMES B. MCDOUGAL,  
JIM GUY TUCKER, and  
SUSAN H. MCDOUGAL

DEFENDANTS

MEMORANDUM OPINION AND ORDER

Defendant Jim Guy Tucker has moved to dismiss the indictment for the alleged reason that the United States Congress rendered the Ethics in Government Act of 1987 unconstitutional by enacting the Independent Counsel Reauthorization Act of 1994, which revises §596(b)(2) (28 U.S.C. §596(b)(2)) and §594(1)(2) (28 U.S.C. §594(1)(2)) of the Act of 1987 by allocating the following unconstitutional powers to (1) the Special Division and (2) the Administrative Office of the United States Courts:

(1) If the Attorney General has not made a request under this paragraph, the division of the court shall determine on its own motion whether termination is appropriate under this paragraph no later than 2 years after the appointment of an independent counsel, at the end of the succeeding 2-year period, and thereafter at the end of each succeeding 1-year period.

(2) The Director of the Administrative Office of the United States Courts shall provide administrative support and guidance to each independent counsel.

This Court, after carefully considering the arguments of both Jim Guy Tucker and the United States Government, is not persuaded that Tucker's challenge is meritorious and, accordingly, denies

ENTERED ON THE DOCKET IN ACCORDANCE  
WITH RULE 55, FRCrP, ON 10/25/95  
BY [Signature]

FOIA # 57720 (URTS 16326) DocId: 70105304 Page 29

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the requested relief for the reasons set forth in this memorandum opinion and order.<sup>1</sup>

## I

### Relevant Particulars

The Ethics in Government Act of 1987 regarding the power of the Special Division to terminate independent counsel provided:

Termination by division of the court. -- The division of the court, either on its own motion or upon the request of the Attorney General, may terminate an office of independent counsel at any time, on the ground that the investigation of all matters within the prosecutorial jurisdiction of such independent counsel or accepted by such independent counsel under section 594(e), and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions. At the time of such termination, the independent counsel shall file the final report required by section 594(h)(1)(B).

Section 596(b)(2), Act of 1987.

The Supreme Court upheld the constitutionality of the Ethics in Government Act (the Act of 1987) in *Morrison v. Olson*, 487 U.S. 654 (1988).

The United States Congress in 1994 enacted the Independent Counsel Reauthorization Act of 1994 which revised §596(b)(2) of the Act of 1987 by adding the following sentence to the above quoted provision:

If the Attorney General has not made a request under

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<sup>1</sup>Defendant Jim Guy Tucker requested leave of the Court to present oral argument in support of his position. The Court is persuaded that the constitutional issues asserted have been thoroughly addressed by both the defendant and the Government in their respective memoranda and oral argument would not materially be of value to the Court in resolving these issues. Therefore, the request for oral argument is denied.

this paragraph, the division of the court shall determine on its own motion whether termination is appropriate under this paragraph no later than 2 years after the appointment of an independent counsel, at the end of the succeeding 2-year period, and thereafter at the end of each succeeding 1-year period.

Section 596(b)(2) of Act of 1994.

In the Act of 1994, Congress also enacted, for the first time, the following provision which provides for administrative service to the independent counsel and is identified as §594(1)(2):

The Director of the Administrative Office of the United States Courts shall provide administrative support and guidance to each independent counsel.

Tucker argues that the new §596(b)(2) under the Act of 1994 grants the Special Division more power than is constitutionally permissible under the ruling of the Supreme Court in *Morrison v. Olson*, *supra*, inasmuch as the new provision "compromises the independence of the judiciary and exceeds the limits of Article III." The Special Division, argues Tucker, "now has the statutory power to review any of the actions of the independent counsel which gives the Special Division the power to participate in the investigations. This is an unwarranted intrusion on the separate powers of the Executive ...." Tucker further asserts that §596(b)(2) under the Act of 1987 was "triggered by a lingering independent counsel[,]" but revised §596(b)(2) of the Act of 1994 is "triggered by time and the discretion of the Special Division" notwithstanding the actions of independent counsel.

With regard to §594(1)(2) of the Act of 1994, Tucker asserts that by authorizing the Administrative Office of the United States Courts to provide administrative support and guidance to the Independent Counsel, Congress infringes the "doctrine of Separation of Powers under Article III of our Constitution by compromising the independence of the judiciary."

On the other hand, the United States Government argues, with respect to §596(b)(2) of the of Act 1994, that "Congress left untouched the section 596(b)(2) language that the Supreme Court had expressly upheld in *Morrison*" ... and added a sentence that "confers absolutely no additional powers on the Special Division" but is essentially a means by which the Special Division may check at specified intervals and "remove from the public payroll an independent counsel who has served his or her purpose, but is unwilling to acknowledge the fact ...."

Relative to §594(1)(2) of the Act of 1994, the Government asserts that the responsibilities conferred on the Administrative Office are "essentially ministerial" and the provision does not delegate "power to supervise the independent counsel in the exercise of counsel's investigative or prosecutorial authority." In essence, argues the Government, "the tasks of the Administrative Office of the United States Courts do not include adjudicatory functions," accordingly, the separation of powers doctrine is not "seriously" implicated.

Essentially, this Court must determine whether the 1994 designated revisions of the Ethics in Government Act of 1987

allocate unconstitutional powers to the Special Court and the Administrative Office of the United States Courts.<sup>2</sup>

#### Discussion

##### A

#### Section 596(b)(2)

In *Morrison v. Olson*, 487 U.S. 654 (1988), the Supreme Court cautiously and judiciously determined whether §596(b)(2) of the Act of 1987 infringes Article III by intruding upon the executive power or Independent Counsel's prosecutorial discretion. In concluding that the termination provision did not violate the Constitution, the Supreme Court observed:

[I]t is the duty of federal courts to construe a statute in order to save it from constitutional infirmities ... and to that end we think a narrow construction is appropriate here. The termination provision of the Act do not give the Special Division anything approaching the power to remove the counsel while an investigation or court proceeding is still underway--this power is vested solely in the Attorney General. As we see it, "termination" may occur only when the duties of the counsel are truly "completed" or "so substantially completed" that there remains no need for any continuing action by the independent counsel .... So construed, the Special Division's power to terminate does not pose a sufficient threat of judicial intrusion into matters that are more properly within the Executive's authority to require that the Act be invalidated as inconsistent with Article III.

In urging prudent forethought in the implementation of the termination provision as well as any revisionary enactment, the Supreme Court stated:

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<sup>2</sup>Although the Government questions the ripeness of Tucker's challenge since the Special Division has not exercised its power, the Court is persuaded that a significant constitutional issue is presented that would evade review in this case since the January 16, 1996 trial will be concluded before the designated review by the Special Division in August of 1996.



We emphasize, nevertheless, that the Special Division has no authority to take any action or undertake any duties that are not specifically authorized by the Act. The gradual expansion of the authority of the Special Division might in another context be a bureaucratic success story, but it would be one that would have serious constitutional ramifications  
....

Morrison, 487 U.S. at 685.

Employing the Supreme Court's cautious and close scrutiny standard in analyzing §596(b)(2) of the Act of 1994, this Court is of the view that the added sentence does not confer any additional powers on the Special Division. As the Government asserts, the Act of 1987 had already conferred on the Special Division the power to terminate Independent Counsel's office. Since the power could be employed by the Special Division's own motion, the 1994 revision simply authorizes the Special Division to check at specified intervals without making any changes in the scope of that power and in the prerequisites to its exercise. The Government argues persuasively that, "[t]he new sentence speaks of 'termination ... under this paragraph,' referring back to the unchanged language of the 1987 Act." In the 1994 Act as in the 1987 one, "[t]he termination provisions ... do not give the Special Division anything approaching the power to remove the counsel while an investigation or court proceeding is still under way." Morrison, 487 U.S. at 682.

Defendant Tucker portrays the added sentence as vesting the Special Division with "the power to periodically review and reappoint an already existing independent counsel." As asserted by the Government, Congress expressly recognized the limits



imposed by Morrison as well as the apparent caveat in the opinion of the Court<sup>3</sup> and rejected a proposed amendment that would have achieved what defendant Tucker mistakenly asserts §596(b)(2) of the Act of 1994 does.<sup>4</sup>

This Court is of the view that there is no significant demonstrable variation between the provision approved by the Supreme Court in Morrison and the revised version pursuant to the Act of 1994.

B

Section 594(1)(2)

Section 594(1)(2) of the Act of 1994 is, in essence, a new provision and as such the Supreme Court did not address the issue in Morrison. However, the Supreme Court in Morrison made the following relevant comment:

[T]he system of separated powers and checks and balances established in the Constitution was regarded by the Framers as 'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other' .... We have not hesitated to invalidate provisions of law which violate principle .... On the other hand, we have never held that the Constitution requires that the three branches of Government 'operate with absolute independence. [Internal citations omitted.]

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<sup>3</sup>H.R. Conf. Rep. No. 511 at 23.

<sup>4</sup>"During its consideration of the bill, the Committee rejected, by voice vote, an amendment that would have required the division of the court to consider, on a periodic basis, not only whether an independent counsel's activities had been completed, but also to 'reappoint the applicant if the court determines that such applicant remains the appropriate person to carry out the duties of the office,' if it concludes that the work of the counsel has not yet terminated. The Committee believes that the exercise of such authority by the division of the court would be unconstitutional under Morrison." H.R. Rep. No. 224 at 23-24.

487 U.S. at 692.

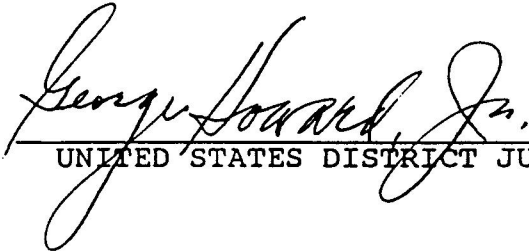
Significantly, it is readily apparent from the plain meaning of the language of the provision that the Administrative Office is to provide ministerial service as opposed to adjudicatory functions. This Court is of the view that the revised provision simply incorporates or embodies what the Administrative Office has provided Independent Counsel over the years. See: H.R. Rep. No. 224, 103d Cong., 1st Sess. 17-18 (1993); S. Rep. No. 101d, 103rd Cong., 1st Sess. 22, 29 (1993); and H.R. Conf. Rep. 511, 103d Cong., 2d Sess. 21 (1994).

This Court is not persuaded that the provision materially and significantly implicates the separation of powers as asserted by Tucker. As the Government notes, the following quotation from Justice Harlan's concurring opinion in *Chandler v. Judicial Council of Tenth Circuit*, 398 U.S. 74,84 (1970) speaks volumes in describing the tasks conferred on the Administrative Office under the statutory provision creating the Administrative Office:

The role of the Administrative Office, and its Director, was to be "administrative" in the narrowest sense of that term. The Director was entrusted with no authority over the performance of judicial business -- his role with respect to such business was, and is, merely to collect information for use by the courts themselves. Chief Justice Groner of the Court of Appeals for the District of Columbia, who was chairman of the committee of circuit judges that participated in drafting the bill, stressed to the Senate Committee on the Judiciary that the bill would give the Director no "supervision or control over the exercise of purely judicial duties," because to grant such power to an administrative officer "would be to destroy the very fundamentals of our theory of government. The administrative officer [the Director] proposed in this bill is purely an administrative officer."

In conclusion, defendant Jim Guy Tucker's September 25th motion to dismiss the indictment on the grounds that the Act of 1994 violates the limitation of Article II by compromising the independence of the judiciary is denied.<sup>5</sup>

IT IS SO ORDERED this 25th day of October, 1995.

  
UNITED STATES DISTRICT JUDGE

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<sup>5</sup>Even if the Court were to find that both questioned provisions are unconstitutional, the legislative history of 28 U.S.C. §598 adopted in 1987 concerning severability states that "[t]his new section makes explicit the common law rule that, in the event a court finds any portion of the statute invalid, the remainder of the statute stays in effect." See: 1987 U.S.C.C.A.N. p. 2178. Thus, Tucker's argument that "[t]he Severance Provision will only save the Act as it applies to new people subsequent to the severance" must be rejected.